

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

GYPSY LAWSON and FRAN OGREN,
Defendants.

No. CR-08-026-FVS-1
CR-08-026-FVS-2

ORDER DENYING DEFENDANTS'
MOTIONS FOR JUDGMENT OF
ACQUITTAL

THIS MATTER came before the Court on April 27, 2009, based upon the defendants' motions for judgment of acquittal. Gypsy Lawson was represented by Kimberly Deater. Fran Ogren was represented by Joshua Rosen and Kailey Moran. The government was represented by Stephanie Van Marter. This order serves to memorialize the Court's oral ruling.

BACKGROUND

Gypsy Lawson and Fran Ogren flew to Thailand during 2007. While there, they searched for a monkey to take back to the United States. Ultimately, they purchased a Rhesus Macaque. When it came to return to the United States, they sedated the monkey. Once the monkey was sedated, Ms. Lawson hid it under her clothing; creating the appearance that she was pregnant. Ms. Lawson and Ms. Ogren did not seek permission from Thai officials to take the monkey out of Thailand, nor did they disclose the monkey's presence to American officials when

1 they arrived in Los Angeles. Ms. Lawson and Ms. Ogren knew that they
2 were violating the law, and that they could be punished if they were
3 caught. As it turned out, neither Thai nor American officials
4 detected the monkey while the women were traveling. It was not until
5 after they had returned to the Eastern District of Washington that
6 American officials learned of the monkey's existence, and then only
7 because they received a tip from a concerned citizen. On July 22,
8 2008, the government filed a Superseding Indictment. Count One
9 charged Ms. Lawson and Ms. Ogren with conspiracy. 18 U.S.C. § 371.
10 Count Two charged them with violating 18 U.S.C. § 545. A jury found
11 both women guilty of both crimes. They filed a timely motion for
12 judgment of acquittal. Fed.R.Crim.P. 29(c).

14 **RULING**

15 A. Alternative Methods of Committing a Single Crime

16 Section 545 of Title 18 is divided into paragraphs. The first
17 two paragraphs create separate crimes. *Olais-Castro v. United States*,
18 416 F.2d 1155, 1157-58 (9th Cir.1969). The defendants were convicted
19 of violating the second paragraph, which makes it unlawful to:
20

21 fraudulently or knowingly import[] or bring[] into the
22 United States, any merchandise contrary to law, or
23 receive[], conceal[], buy[], sell[], or in any manner
24 facilitate[] the transportation, concealment, or sale of
25 such merchandise after importation, knowing the same to have
26 been imported or brought into the United States contrary to
law[.]

18 U.S.C. § 545. The defendants argue that the second paragraph of §

1 545 creates at least two crimes. In their opinion, one crime consists
2 of importing merchandise into the United States contrary to law; the
3 other crime consists of receiving, concealing, buying, selling, or in
4 any manner facilitating the transportation, concealment, or sale of
5 such merchandise after importation. The government disagrees with the
6 defendants' interpretation of the second paragraph of § 545.
7 According to the government, the second paragraph describes
8 alternative means by which a person may commit a single crime.
9

10 Neither the Ninth Circuit nor any other circuit court of appeals
11 has addressed the parties' competing interpretations of the second
12 paragraph of § 545. However, the Ninth Circuit has provided guidance.
13 In *United States v. Arreola*, 467 F.3d 1153, 1157 (9th Cir.2006), the
14 circuit court explained that it employs the analytical framework
15 established in *United States v. UCO Oil Co.*, 546 F.2d 833 (9th
16 Cir.1976), when asked to determine whether a statute creates separate
17 offenses or simply describes alternative means of committing the same
18 crime. "Under *UCO Oil*, we consider . . . (1) [the] 'language of the
19 statute itself,' (2) 'the legislative history and statutory context,'
20 (3) the type of conduct proscribed, and (4) the 'appropriateness of
21 multiple punishment for the conduct charged in the indictment.'" *Arreola*, 467 F.3d at 1157 (quoting *UCO Oil Co.*, 546 F.2d at 836-38).

24 It is appropriate to begin with the language of the statute.
25 *Arreola*, 467 F.3d at 1157. Congress could have divided the second
26 paragraph of § 545 into separate paragraphs. This would have strongly

1 suggested that Congress intended to create more than one crime. 467
2 F.3d at 1157. Instead, Congress left the second paragraph as a single
3 unit. The fact that Congress did so indicates an intent to create a
4 single crime. See *id.* Granted, the second paragraph of § 545 is
5 composed of several clauses. As the defendants observe, it is
6 unlawful either to "fraudulently or knowingly import[] or bring[] into
7 the United States, any merchandise contrary to law, **OR** receive[],
8 conceal[], buy[], sell[], or in any manner facilitate[] the
9 transportation, concealment, or sale of such merchandise after
10 importation[.]" 18 U.S.C. § 545 (capitalization and emphasis added).
11 The fact the preceding clauses are divided by a disjunctive "or" is
12 relevant, but not especially helpful to the defendants. Ordinarily,
13 the fact a statute uses a disjunctive "or" means the statute is
14 specifying two or more ways in which a single crime can be committed.
15 See, e.g., *United States v. Booth*, 309 F.3d 566, 572 (9th Cir.2002)
16 ("[i]t is apparent from the disjunctive 'or' . . . that the crime may
17 be committed with either of the two specified states of mind"). This
18 reading of the second paragraph of § 545 is reinforced by considering
19 the penalty provision. Punishment does not vary depending upon
20 whether a person imports merchandise contrary to law or whether he
21 facilitates the transportation of unlawfully imported merchandise. In
22 either event, the punishment is the same. Uniformity of penalty
23 suggests that Congress intended to create a single crime. *Arreola*,
24 467 F.3d at 1157-58. Indeed, that is the most sensible interpretation
25
26

1 of the second paragraph of § 545. The various clauses of that
2 paragraph are simply alternative means by which a person may commit a
3 single crime.

4 B. Merchandise

5 The term "merchandise" is not defined by § 545. As a result, the
6 Ninth Circuit uses the definition set forth in 19 U.S.C. § 1401(c).
7 *United States v. Garcia-Paz*, 282 F.3d 1212, 1214 (9th Cir.2002).
8 Under § 1401(c), "[t]he word 'merchandise' means goods, wares, and
9 chattels of every description, and includes merchandise the
10 importation of which is prohibited[.]" The Rhesus monkey was the
11 defendants' chattel. Black's Law Dictionary 229 (7th ed.1999). Thus,
12 the monkey constituted merchandise within the meaning of § 545.
13

14 C. Contrary to Law

15 The government presented overwhelming evidence that the
16 defendants left Thailand with a monkey and brought the monkey into the
17 United States with them. Witnesses variously described the
18 defendants' monkey as a "Rhesus monkey" and a "Rhesus Macaque." It
19 was clear that the witnesses were referring to the defendants' monkey.
20 After considering all of the evidence, the jury found that the
21 defendants imported, concealed, and transported a Rhesus Macaque,
22 i.e., a monkey. It is common knowledge that a monkey is a primate.
23 For example, anyone who has toured a reputable zoo can attest to that
24 fact. Consequently, it was unnecessary for the government to offer
25 expert testimony in order to establish that a monkey is a primate.
26

1 *Cf. United States v. Miller*, 981 F.2d 439, 443 (9th Cir.1992) ("The
2 common knowledge of even schoolchildren that saguaro is cactus made
3 expert testimony on its botanical character unnecessary.").

4 All primates are included in either Appendix I or Appendix II of
5 the Convention on International Trade in Endangered Species of Wild
6 Fauna and Flora ("CITES" or "Convention"), 27 U.S.T. 1087, T.I.A.S.
7 No. 8249. Both Thailand and the United States signed the Convention.
8 The United States implemented its CITES obligations through the
9 Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"). *See, e.g.,*
10 *United States v. Norris*, 452 F.3d 1275, 1277-78 (11th Cir.2006);
11 *United States v. Koczuk*, 252 F.3d 91, 97-98 (2d Cir.2001). Under the
12 ESA, "[i]t is unlawful for any person subject to the jurisdiction of
13 the United States to engage in any trade in any specimens contrary to
14 the provisions of the Convention[.]" 16 U.S.C. § 1538(c)(1).
15 Congress authorized the Secretary of the Interior to promulgate
16 regulations in order to enforce the ESA. 16 U.S.C. § 1540(f). In
17 response, the Secretary promulgated Part 23 of Title 50 of the Code of
18 Federal Regulations. 50 C.F.R. § 23.1(a) ("[t]he regulations in [Part
19 23] implement the Convention on International Trade in Endangered
20 Species of Wild Fauna and Flora").
21
22

23 The jury convicted the defendants of violating the second
24 paragraph of 18 U.S.C. § 545. In order to convict them, the jury had
25 to find that they imported merchandise contrary to law.

26 Administrative regulations do not necessarily constitute "law" for

1 purposes of 18 U.S.C. § 545. *United States v. Alghazouli*, 517 F.3d
2 1179, 1187 (9th Cir.2008), *cert. denied*, --- U.S. ----, 129 S.Ct. 237,
3 172 L.Ed.2d 180 (2008). "The term ['law'] includes a regulation only
4 if there is a statute (a 'law') that specifies that violation of that
5 regulation is a crime." *Id.* at 1187. Here, there is such a statute.
6 Section 1538(c)(1) of Title 16 makes it unlawful "to engage in any
7 trade in any specimens contrary to the provisions of the
8 Convention[.]" The United States' obligations under the Convention
9 are embodied in the regulations contained in Part 23. 50 C.F.R.
10 23.1(a). Since § 1538(c)(1) makes it unlawful to engage in trade that
11 is "contrary to the provisions of the Convention," and since the
12 relevant provisions of the Convention are embodied in Part 23, a
13 person who violates the regulations set forth in Part 23 violates the
14 law. This interpretation is consistent with the Secretary's
15 understanding of the consequences of violating the regulations that
16 are contained in Part 23:
17

18 Except as provided in § 23.92, it is unlawful for any person
19 subject to the jurisdiction of the United States to conduct
20 any of the following activities unless they meet the
21 requirements of this part:

22 (a) Import, export, re-export, or engage in
23 international trade with any specimen of a species listed in
24 Appendix I, II, or III of CITES.

25

26 50 C.F.R. § 23.13.

Even if the Part 23 regulations are not "law" for purposes of 18
U.S.C. § 545, the government nonetheless presented evidence which is

1 sufficient to prove that the defendants imported a primate contrary to
2 law. Article IV of the Convention imposes restrictions upon the trade
3 in Appendix II species, of which the Rhesus Macaque is one. Not only
4 were the defendants required to obtain an export permit from Thailand,
5 but also they were required to obtain an import permit from the United
6 States. CITES, Art. IV, ¶¶ 2, 4. The defendants did not attempt to
7 obtain either permit. Consequently, when they removed a Rhesus
8 Macaque from Thailand and brought it into the United States, they
9 violated 16 U.S.C. § 1538(c)(1) by engaging in trade that is contrary
10 to the provisions of the Convention. In other words, they acted
11 contrary to law within the meaning of the second paragraph of 18
12 U.S.C. § 545.

14 D. Genus and Taxon

15 The Superseding Indictment alleged, in part, that the "Rhesus
16 Macaque (*macaca mullata*)" is subject to "Appendix II permit
17 requirements." (Superseding Indictment at 2 (italicization in the
18 original)). Given that allegation, the defendants argue it was
19 incumbent upon the government to prove both the Genus (*Macaca*) and
20 Taxon (*Macaca mulatta*) of the Rhesus monkey. The defendants are
21 incorrect. The government is not required to prove all of the facts
22 that are alleged in an indictment simply because the indictment
23 alleges them. *United States v. Jenkins*, 785 F.2d 1387, 1392 (9th
24 Cir.1986). To the contrary, the government is obligated to present
25 "only enough facts to prove the essential elements of the crime
26

1 [charged in the indictment]." *Id.* As explained above, there is more
2 than one method by which a person may violate the second paragraph of
3 § 545. However, each method requires proof that merchandise was
4 imported into the United States contrary to law. Here, the
5 merchandise was a primate. In order to prove that the primate was
6 unlawfully imported, the government had to prove it is covered by
7 CITES. Were only some primates covered by CITES, it might be
8 necessary for the government to offer evidence concerning a particular
9 primate's Genus and Taxon in order to prove that it is covered.
10 However, all primates are covered by either Appendix I or Appendix II
11 of the Convention. There are no exceptions. Thus, it was unnecessary
12 for the government to identify a particular primate by Genus and
13 Taxon. The Superseding Indictment's reference to a *Macaca mulatta* is
14 mere surplusage. As such, it need not be proved. *See Jenkins*, 785
15 F.2d at 1392 ("Insofar as the language of an indictment goes beyond
16 alleging elements of the crime, it is mere surplusage that need not be
17 proved").

18 E. Jury Unanimity Preserved

19
20 The defendants argue that both Count 1 (conspiracy) and Count 2
21 (violating 18 U.S.C. § 545) are duplicitous. "An indictment is
22 duplicitous where a single count joins two or more distinct and
23 separate offenses." *United States v. Ramirez-Martinez*, 273 F.3d 903,
24 913 (9th Cir.2001), *cert. denied*, --- U.S. ----, 123 S.Ct. 330, 154
25 L.Ed.2d 226 (2002). A duplicitous count threatens a defendant's Sixth
26

1 Amendment right to a unanimous verdict. *United States v. Savage*, 67
2 F.3d 1435, 1439 (9th Cir.1995). When a jury returns a verdict of
3 guilty with respect to a duplicitous count, a court cannot always be
4 confident that the jury agreed unanimously with respect to which of
5 the two crimes the defendant committed. See *id.*

6 Count One alleged that the defendants committed "the following
7 offense against the United States: Smuggling/Concealing/Receiving of
8 Goods into the United States, to-wit: a Rhesus Macaque, in violation
9 of Title 18, United States Code, Section 545, all in violation of 18
10 United States Code 371." (Superseding Indictment at 3). The word
11 "smuggling" is found in the first paragraph of § 545. The words
12 "concealing" and "receiving" are found in the second paragraph. The
13 defendants think that each of the three words -- i.e., "smuggling,"
14 and "concealing," and "receiving" -- represents a separate conspiracy
15 allegation. In other words, they think Count One charged them with
16 three separate conspiracies. That being the case, say the defendants,
17 Count One is duplicitous. They are incorrect. "The allegation in a
18 single count of a conspiracy to commit several crimes is not
19 duplicitous, for [t]he conspiracy is the crime, and that is one,
20 however diverse its objects." *United States v. Smith*, 891 F.2d 703,
21 712 (9th Cir.1989) (internal punctuation and citations omitted),
22 amended by 906 F.2d 385 (9th Cir.), cert. denied, 498 U.S. 811, 111
23 S.Ct. 47, 112 L.Ed.2d 23 (1990). See also *United States v. Begay*, 42
24 F.3d 486, 501 (9th Cir.1994) ("An indictment charging conspiracy to
25
26

1 commit more than one offense is not duplicitous.").

2 Count Two alleged that the defendants violated 18 U.S.C. § 545 by
3 "knowingly import[ing] and bring[ing] into the United States
4 merchandise, to wit: a Rhesus Macaque, contrary to law[.]"

5 (Superseding Indictment at 3). The defendants acknowledge that Count
6 Two follows the language of the second paragraph of § 545. Since, in
7 the defendants' opinion, the second paragraph defines more than one
8 crime, and since Count Two charges them with violating the second
9 paragraph, it follows, say the defendants, that Count Two is
10 duplicitous. They are incorrect. The second paragraph of § 545
11 describes alternative means by which a person can commit a single
12 crime. Count Two is not duplicitous.¹

14 Even if Counts One and Two were duplicitous, the defendants are
15 not entitled to judgment of acquittal on that ground. "[A] defendant
16 indicted pursuant to a duplicitous indictment may be properly
17

18
19 ¹The defendants rely heavily upon *Torres Martinez v. United*
20 *States*, 220 F.2d 740 (1st Cir.1955), to support their assertion
21 that the Superseding Indictment is duplicitous. In *Torres*
22 *Martinez*, the First Circuit analyzed a count that was based upon
23 former 21 U.S.C. § 174. 220 F.2d at 742-43. The First Circuit
24 implied that the count was duplicitous. *Id.* at 743. It is
25 questionable whether the Ninth Circuit would have agreed. *Cf.*
26 *Pon Wing Quong v. United States*, 111 F.2d 751, 755 (9th Cir.1940)
(holding that a count which charged the defendant with concealing
and facilitating the concealment of opium after its importation
was not duplicitous). In any event, the First Circuit's analysis
provides little guidance here.

1 prosecuted and convicted if . . . the court provides an instruction
2 requiring all members of the jury to agree as to which of the distinct
3 charges the defendant actually committed." *Ramirez-Martinez*, 273 F.3d
4 at 915. The Court provided verdict forms to the jurors that required
5 them to make specific findings in the event they found a defendant
6 guilty. The jurors made specific findings with respect to each count.
7 Consequently, the defendants were not deprived of their Sixth
8 Amendment right to a unanimous verdict.
9

10 F. Venue

11 "Article III of the Constitution, the Sixth Amendment, and Rule
12 18 of the Federal Rules of Criminal Procedure all guarantee that a
13 defendant will be tried in the state where the crimes were committed."
14 *United States v. Corona*, 34 F.3d 876, 878-79 (9th Cir.1994). The
15 defendants were charged with conspiracy (Count One) and violating 18
16 U.S.C. § 545 (Count Two). They now allege that the Eastern District
17 of Washington is not the proper venue for those charges.² When a
18 defendant is charged with both a substantive crime and a conspiracy, a
19

21 ²A venue challenge may be waived. *United States v. Novak*,
22 443 F.3d 150, 161 (2d Cir.), cert. denied, 549 U.S. 997, 127
23 S.Ct. 525, 166 L.Ed.2d 371 (2006). The defects that the
24 defendants now allege were readily apparent on the face of the
25 Superseding Indictment, yet they did not challenge venue prior to
26 trial. As a result, they waived their right to challenge venue.
Id. ("When the defect in venue is apparent on the face of the
indictment, a defendant waives the right to contest the issue if
he or she fails to object prior to trial.").

1 district court "must conduct a separate venue analysis for the
2 substantive crime[] and the conspiracy, even if the substantive
3 crime[] [is] committed in furtherance of the conspiracy." *Id.* at 879.

4 *1. Venue for conspiracy charge*

5 The defendants submit that Count One charged them with three
6 separate conspiracies. According to the defendants, one conspiracy
7 involved an alleged agreement to smuggle merchandise into the United
8 States. See 18 U.S.C. § 545 (first paragraph). Another conspiracy
9 involved an alleged agreement to conceal unlawfully imported
10 merchandise. See 18 U.S.C. § 545 (second paragraph). A third
11 conspiracy involved an alleged agreement to receive unlawfully
12 imported merchandise. See 18 U.S.C. § 545 (second paragraph). The
13 defendants argue that the Eastern District of Washington was not the
14 proper venue for any of the three conspiracy charges alleged in Count
15 One. The problem with this argument is that it is based upon an
16 unwarranted assumption. Count One did not allege multiple
17 conspiracies. It alleged a single agreement to engage in conduct that
18 violated 18 U.S.C. § 545. "[V]enue is appropriate in any district
19 where an overt act committed in the course of the conspiracy
20 occurred." *United States v. Meyers*, 847 F.2d 1408, 1411 (9th
21 Cir.1988) (internal punctuation and citations omitted). A rational
22 jury could have found that the defendants or their co-conspirator,
23 James Pratt, committed at least one overt act in this district. For
24 example, the jury heard evidence that the defendants drove the monkey
25
26

1 from Los Angeles to the Eastern District of Washington. The jury
2 rationally could have found that the defendants transported
3 merchandise into this district knowing that it had been imported
4 unlawfully. In addition, the jury heard evidence that Mr. Pratt
5 falsely told law enforcement officers in this district that the
6 defendants purchased the monkey in California. The jury rationally
7 could have found that Mr. Pratt lied to law enforcement officers in
8 order to conceal the true origin of the merchandise; hoping to prevent
9 its confiscation.
10

11 *2. Venue for substantive charge*

12 "Any offense involving . . . the importation of an object . . .
13 into the United States is a continuing offense and . . . may be . . .
14 prosecuted in any district from, through, or into which such . . .
15 imported object . . . moves." 18 U.S.C. § 3237(a). The second
16 paragraph of 18 U.S.C. § 545 proscribes, among other things, both the
17 importation of merchandise contrary to law and the concealment of
18 merchandise that has been imported contrary to law. It follows that a
19 violation of the second paragraph of § 545 is a continuing offense. A
20 § 545 violation may be prosecuted in any district into which the
21 imported object moves. In this instance, the defendants transported
22 imported merchandise into this district. Consequently, venue was
23 proper.
24

25 G. Constructive Amendments

26 The defendants had a Fifth Amendment right to be tried upon the

1 charges set forth in the Superseding Indictment. *United States v.*
2 *Antonakeas*, 255 F.3d 714, 721 (9th Cir.2001). "[A]fter an indictment
3 has been returned its charges may not be broadened through amendment
4 except by the grand jury itself." *United States v. Hartz*, 458 F.3d
5 1011, 1019-20 (9th Cir.2006) (quoting *Stirone v. United States*, 361
6 U.S. 212, 215-16, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1960)). "An
7 amendment of the indictment occurs when the charging terms of the
8 indictment are altered, either literally or in effect, by the
9 prosecutor or a court after the grand jury has last passed upon them."
10 *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir.1984). As
11 observed above, the defendants insist that Count One charged them with
12 three conspiracies. In the defendants' opinion, one conspiracy
13 involved an alleged agreement to engage in conduct that violated the
14 first paragraph of § 545; two other conspiracies involved alleged
15 agreements to engage in conduct that violated the second paragraph of
16 § 545. The defendants argue that the Court constructively amended
17 Count One in two respects. For one thing, the defendants think the
18 Court failed to instruct the jury concerning two of the conspiracies
19 which were alleged in Count One. For another thing, the defendants
20 think the Court instructed the jury concerning a conspiracy which was
21 not alleged in Count One. The defendants' interpretation of the jury
22 instructions is unpersuasive. As the Court explained earlier, Count
23 One did not allege multiple conspiracies. It alleged a single
24 conspiracy. The Court instructed the jury with respect to the single
25
26

1 conspiracy that was alleged in Count One. Furthermore, the Court's
2 instructions to the jury did not broaden the scope of the charge; if
3 anything, they narrowed it. Section 545 covers a broad range of
4 conduct. The Court's jury instructions limited the scope of the
5 defendant's potential liability. For example, the Court instructed
6 the jury that it could convict the defendants only if, among other
7 things, it found "that there was an agreement between two or more
8 persons to knowingly import a Rhesus Macaque into the United States
9 contrary to law and/or knowingly conceal an unlawfully imported Rhesus
10 Macaque and/or knowingly facilitate the transportation of an
11 unlawfully imported Rhesus Macaque[.]" (Jury Instruction No. 9.)

12
13 H. Variance

14 Count Two alleged that "[o]n or about November 28, 2007," the
15 defendants violated 18 U.S.C. § 545 in the Eastern District of
16 Washington. (Superseding Indictment at 7.) According to the
17 defendants, the Court did not require the jury to find that they
18 violated § 545 in the Eastern District of Washington on or about
19 November 28, 2007. Nor, say the defendants, could the jury have made
20 such a finding. While they concede that they arrived in Los Angeles
21 on or about November 28, 2007, they submit they did not arrive in the
22 Eastern District of Washington until December 6, 2007. It is true, as
23 the defendants contend, that there is a variance between the date
24 alleged in the Superseding Indictment (November 28, 2007) and the date
25 upon which they arrived in the Eastern District of Washington with the
26

1 monkey (December 6, 2007). However, the defendants suffered no
2 prejudice as a result of the variance. First, a violation of § 545 is
3 a continuing offense. 18 U.S.C. § 3237(a). Thus, the offense did not
4 stop when the defendants left the airport in Los Angeles. To the
5 contrary, the offense continued from November 28, 2007, through
6 December 6, 2007, and beyond. Second, the date of the offense is not
7 a material element of § 545. Consequently, a variance that does not
8 affect a defendant's substantial rights is harmless. Fed.R.Crim.P.
9 52(a). The variance cited by the defendants -- *i.e.*, eight days -- is
10 too small, given the facts of this case, to affect their substantial
11 rights. *See, e.g., United States v. Shea*, 493 F.3d 1110, 1118 (9th
12 Cir.2007) (collecting cases).

14 I. Unduly Harsh Punishment

15 The defendants argue that Congress did not intend persons who
16 engage in conduct like theirs to be prosecuted under 18 U.S.C. § 545.
17 According to the defendants, Congress has enacted more specific
18 statutes -- *e.g.*, the Lacey Act, 16 U.S.C. § 3371, *et seq.* -- to
19 address the type of conduct that they engaged in. The defendants
20 argue that the government could have, and should have, prosecuted them
21 under the Lacey Act. Had the government done so, say the defendants,
22 they would be facing punishment that is commensurate with the
23 seriousness of their acts. Instead, in their opinion, they face
24 unduly harsh punishment. The defendants urge the Court to protect
25 them from felony convictions by granting judgment of acquittal under
26

1 either the rule of lenity or, perhaps, the Due Process Clause of the
2 Fifth Amendment. The Court declines to do so. "When, as here,
3 conduct violates more than one criminal statute the government may
4 generally elect which statute it wishes to charge. . . . This is so
5 even though one statute imposes felony penalties and the other merely
6 imposes misdemeanor penalties." *United States v. Edmonson*, 792 F.2d
7 1492, 1497 (9th Cir.1986). Given this principle, the defendants are
8 not entitled to judicial review of the government's decision to charge
9 them with felonies under 18 U.S.C. § 545 rather than charging them
10 with misdemeanors under some more specific statute. Nor are the
11 defendants entitled to relief under the rule of lenity. As the
12 government points out, "the rule of lenity applies only when the
13 statutory language contains grievous ambiguity or uncertainty and
14 when, after seizing everything from which aid can be derived, [a
15 court] can make no more than a guess as to what Congress intended."
16 *United States v. Banks*, 514 F.3d 959, 964 (9th Cir.2008) (internal
17 punctuation and citations omitted). The second paragraph of § 545 is
18 not so ambiguous that the Court must guess at its meaning. To the
19 contrary, its reasonably clear. As a result, the rule of lenity is
20 inapplicable.

21
22
23 **IT IS HEREBY ORDERED:**

24 1. Fran Ogren's motion for judgment of acquittal (**Ct. Rec. 230**)
25 is **denied**.

26 2. Gypsy Lawson's motion for judgment of acquittal (**Ct. Rec. 232**)

1 is **denied**.

2 **IT IS SO ORDERED.** The District Court Executive is hereby
3 directed to enter this order and furnish copies to counsel.

4 **DATED** this 1st day of May, 2009.

5
6 s/ Fred Van Sickle
Fred Van Sickle
7 Senior United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26